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SUPREME COURT, U.S.

No. 98-1225

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

LARRY BARNES, SR., M.D.
Petitioner

vs

LOWE'S COMPANIES, INC.
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

LARRY BARNES, SR., M.D.
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17 PP

QUESTIONS PRESENTED

1. Whether it is unconstitutional for a retail merchant engaged in multi-state public commerce to use racial profiling as a criterion for theft prevention?

2. Whether racial profiling by a retail merchant engaged in multi-state public commerce constitutes ex ante racial discrimination and is this a form of discrimination?

3. Whether a retail merchant engaged in multi-state public commerce enjoys absolute immunity from civil action under Title II of the Civil Rights Act of 1964?

4. Does the racial profiling of African Americans by a retail merchant constitute "badges and incidents of slavery" proposed by the United States Supreme Court decision in *Jones v. Mayer?* Does the racial profiling constitute intentional discrimination?

5. Whether a District Court Judge may use his broad discretion to dismiss a case before the facts of the case are determined when those facts determine federal jurisdiction?

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Dunn v. Bleumstein, 40 U.S. 330, 363-64 (1972) (Burger, C.J. dissenting).....6

Hirabayashi v. United States, 320 U.S. 81 111 (1943).....7

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Maryland v. Baltimore Radio Show, 338 U.S. 912, 70 S. Ct. 252, 94 L.ed. 562 (1950).....5

State of Ohio ex rel. Seney v. Swift Co. 260 U.S. 140 (1922).....4

Ticor Title Insurance Co v. Brown 114 S.Ct. 1359, 1362, 128 L.ed.2d 33 (1994).....5

RULES:

SUPREME COURT RULE 7.....4
SUPREME COURT RULE 10.....4

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OTHER TREATISES:

Barnes, Larry. Racial Profiling in the United States. Raleigh: D. L. Tenens Press, (1999 in press)

Barnes, Larry. Lowe's v. Barnes: Shopping While Black (SHOWhiB). Raleigh: D.L. Tenens Press, (1999 in press)

Barnes, Larry. Barnes v. Lowe's : Jury Duty. Raleigh: D.L. Tenens Press, (1999 in press)Rehnquist, William. "Remarks of the Chief Justice, Plenary Academic panel: the Future of the Federal Courts", American University, April 6, 1996

Omi, M., Winant, H. Racial Formation in the United States: From the 1960s to the 1980s. New York: Routledge, (1986/1989)

Gilen, Martin. "Race and Poverty in America: Public Miscon ceptions and the American News Media." Public Policy Quarterly, (vol. 6, 1996).

Bloom, R.M., Brodin, M.S. Constitutional Criminal Procedure:Examples and Explanations. (1992)

STATEMENT OF THE CASE

A. Factual Allegations of Complaint

The respondent's Brief in Opposition is filled with inaccurate statement and fabrications. In the brief the Respondent recites and argues references that are grossly inaccurate. The Respondent having based it case on Hearsay Evidence. The defense has had to speculate and fabricate its facts in order to create a defensible case. The Respondent has produced no witnesses willing to swear to their allegations under oath. Hence, the Respondent relies exclusively on legal thaumaturgy to create a generic case which is defensible. The Petitioner as the only eyewitness provides the "best" evidence in the instant case.

The Petitioner claims a gross inaccuracy in the Respondent's Brief in Opposition on page 3 paragraph 3 in which they make the statement:

> "In the Complaint, Petitioner alleges that as he was leaving the store, he was approached by a Lowe's Theft Prevention Officer named Gene Blount."

The above statement is **totally inaccurate**, however it serves as the basis for the Respondents Defense. The District Court erroneously accepted the above Respondent's version as fact without confirmation. **The incident above occurred in the Parking lot, <u>not</u> as the Petitioner " was leaving the store"**.
There is no place in any Complaint or Pleading in which the Petitioner uses the term, "as he left the store". The phrase, "as he left the store" is the progeny of the Respondent's Defense. None of the Respondent's witnesses could swear to this statement without committing **perjury**, hence the Respondent does not have any witnesses to substantiate their defense. The truthful facts of the case are as stated by the Petitioner in his Complaint, "**After leaving the store and while in the parking lot, the Plaintiff was approached by a Lowe's Theft Preven-**

tion Officer who was identified as "Gene Blunt" (See Brief in Opposition, Appendix A, page 4a).

The Petitioner swore to his eyewitness account of the incident under oath and penalty of perjury. The Respondent was unable to get any witness to make a statement under oath to refute assertions of the Petitioner. In spite of the overwhelming evidence in favor of the Petitioner's account. The District Court used its "board discretion" to dismiss the case within 48 hours after the Petitioner served his first set of Interrogatories on Respondent, no Discovery was allowed. The District Court arbitrarily accepted the Respondent's version of the events, even thought the Respondent's Defense could not permit a single witness to verify their account of events. The Petitioner assumed that the actions of District Court may have represented vestige antebellum legal reasoning or a level of Constitutional reasoning beyond the comprehension the Petitioner's.

The Respondent further claims that, "There are no allegations that Gene Blount attempted to detain Petitioner, ."
This statement is counter intuitive! How could a Theft Prevention Officer chase a suspect (Petitioner) pushing a shopping cart full of merchandise, stop him, accuse him of sholifting, perform a full humiliating search in the parking lot, and **not** have detained the Petitioner (suspect). (See Petitioner's Appendix A,B,C and D).

The Respondent further states, "while he was in the store, an African American employee told the Petitioner that he had been given "nigger treatment." This scenario again was created by the Respondent to distort the true facts. The Petitioner has never stated the above incident with a Lowe's employee occurred inside the store. No such event occurred inside of the store, this encounter in which an African American Lowe's employee commented that the Petitioner had received "nigger treatment" occurred in the parking lot. Since the event occurred in the parking lot, it would have been impossible for anyone

inside of the store to have seen or heard the details of this incident.

The Respondent systematically has distorted the facts of this case in order present its case in the best light of the Court.

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, the Petitioner submits a Reply Brief to Respondent's Brief in Opposition.

REASONS TO GRANT WRIT

BEFORE A REPLY TO THE RESPONDENT'S REQUEST FOR DENIAL OF THE WRIT CERTIORARI, THE PETITIONER WOULD LIKE TO POINT OUT A VERY SERIOUS ERROR ON PAGE 5 PARAGRAPH 1 OF THE RESPONDENT'S BRIEF IN OPPOSITION. THE RESPONDENT INCORRECTLY QUOTES SUPREME COURT RULE 7 AS THE RULE GOVERNING REVIEW ON CERTIORARI. THEIR OPENING SENTENCE STATES, "REVIEW ON A WRIT OF CERTIORARI IS NOT A MATTER OF RIGHT BUT OF JUDICAL DISCRESTION, AND A PETITION WILL BE GRANTED ONLY FOR COMPELLING REASONS," IS NOT FOUND IN THE TEXT OF SUPREME COURT RULE 7. SUPREME COURT RULE 7 IS TITLED "PROHIBITION AGAINST PRACTICE." SUPREME COURT RULE 10 (JAN. 1, 1990) READS "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI." IT IS SUPREME COURT RULE 10, NOT RULE 7 WHICH DEFINES CERTIORARI.

Pursuant Supreme Court Rule 10, "Review on writ of certiorari is not a matter of right, but of judicial discretion." "A petition for writ will be granted only for compelling reasons." The jurisdiction to review judgements and decrees by certiorari is to be exercised sparingly only in cases of real and general importance. *State of Ohio ex rel. Seney V. Swift Co.*, 260 U.S. 140 (1922).

The Court should not grant certiorari merely to achieve justice in a particular case. Moreover, the Court should grant certiorari in the interest of the public, not merely for the interest of the parties. *Maryland v. Baltimore Radio show*, 338 U.S.

912, 70 S.Ct 252, 94 L.Ed. 562 (1950). *Ticor Title Insurance Co. v. Brown* 114 S.Ct. 1359, 1362, 128 L.Ed.2d 33 (1994).

In the instant case, the Petition for Writ of Certiorari satisfies the criteria for review by the Court. The issue of racial profiling, consumer or mercantile racism is a compelling issue and an issue of great public importance. It is not only a form of intentional racial discrimination against African Americans, but a threat to the individual civil liberties of all Americans. Racial profiling has become epidemic and poses a threat to American Democracy. The issue of "racial profiling" has become so uncontrolled that several states including Maryland, New Jersey, Pennsylvania and North Carolina have taken action specifically to curtail such actions. While there has been state action to curtail racial profiling, private interests have resisted efforts to abolish this practice.

Intentional racial discrimination, inherent in racial profiling is proliferating in the private sector due to inaction by the courts. The Federal Courts seem dumbfounded with the issues of the intent and effect of racial profiling, consumer or mercantile racism. The lack of a judicial history and precedent has lead to the wholesale dismissal of many valid claims. The dynamics of the legal and sociological constructs associated with this phenomena present a nebulous legal perplexity which by default are considered invalid federal claim. Racial profiling does not represent some "new cause of action" rather de facto residua of "badges and incidents" of slavery defined by *Jones v. Mayer,* private and intentional racial discrimination. *Jones v. Alfred Mayer Co.,* 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed 1189 (1950). Racial profiling is a modern form of Jim Crow practice which have been ruled unconstitutional repeatedly by the Court, hence the Court already has the authority to address private racial profiling. The Federal Judiciary must extricate itself from the Brown v. Board of Education genre and accept cases which are more in line with the social evolution. *Brown v. Board of Education* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). While the Court has address the fundamental issues in the past, the contemporary question is not if African Americans can enter the

front door of a restaurant, but how will they be treated once inside. It is these issues of social and legal evolution which the instant case addresses. Racial profiling is a substantial Federal Question.

In words of Chief Justice William Rehnquist:

> "It would be a mistake to think that just because a certain kind of judicial business has always been conducted in a particular way in the past, it therefore ought to be conducted that way in the future. The federal courts, like other government institutions, must, where necessary, change with the times".
>
> "Change is the law of life, and the judiciary will have to change to meet the challenges which it will face in the future."

With respect to the instant case the future is now. An old cause of action, equal treatment for African Americans, has undergone a metamorphosis and re-emerged as racial profiling. The Court has a moral and legal obligation to address this issue.

Racial profiling constitutes an intentional form of discrimination. The Court has always found intentional discrimination to be unconstitutional. Intentional discrimination is only allowed by a "compelling state interest." Chief Justice Burger, asserted, "no discriminator has ever satisfied this seemingly insurmountable standard." *Dunn v. Blumstein,* 40 U.S. 330, 363-64 (C.J. Burger, dissenting). Since racial profiling does not meet this insurmountable standard, both private and state racial profiling must be unconstitutional.

However, in two exceptional instances the Court has held that intentional discrimination as Constitutional. The Supreme Court upheld discrimination against Japanese Americans during World War II in the context of national security, "gravest, imminent danger to the public safety" and "conditions of great emergency." *Korematsu v. United States*, 323 U.S. 214, 218

(1944). *Hirabayashi v. United States*, 320 U.S. 81 Ill (1943). The government later compensated the victims of these rulings. The African American Community does not now, nor have they ever posed a threat to the nation's "security" and "public safety." Therefore, there exists no Constitutional basis for intentional discrimination caused by racial profiling.

Finally, the Petitioner urges the Court to do that which it is Constitutionally mandated to do, rule on the issue of racial profiling in the instant case. The complaint is a cognizable claim for relief and there are compelling circumstances in the nation's interest warranting the granting of a writ, in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

Larry Barnes, Pro se
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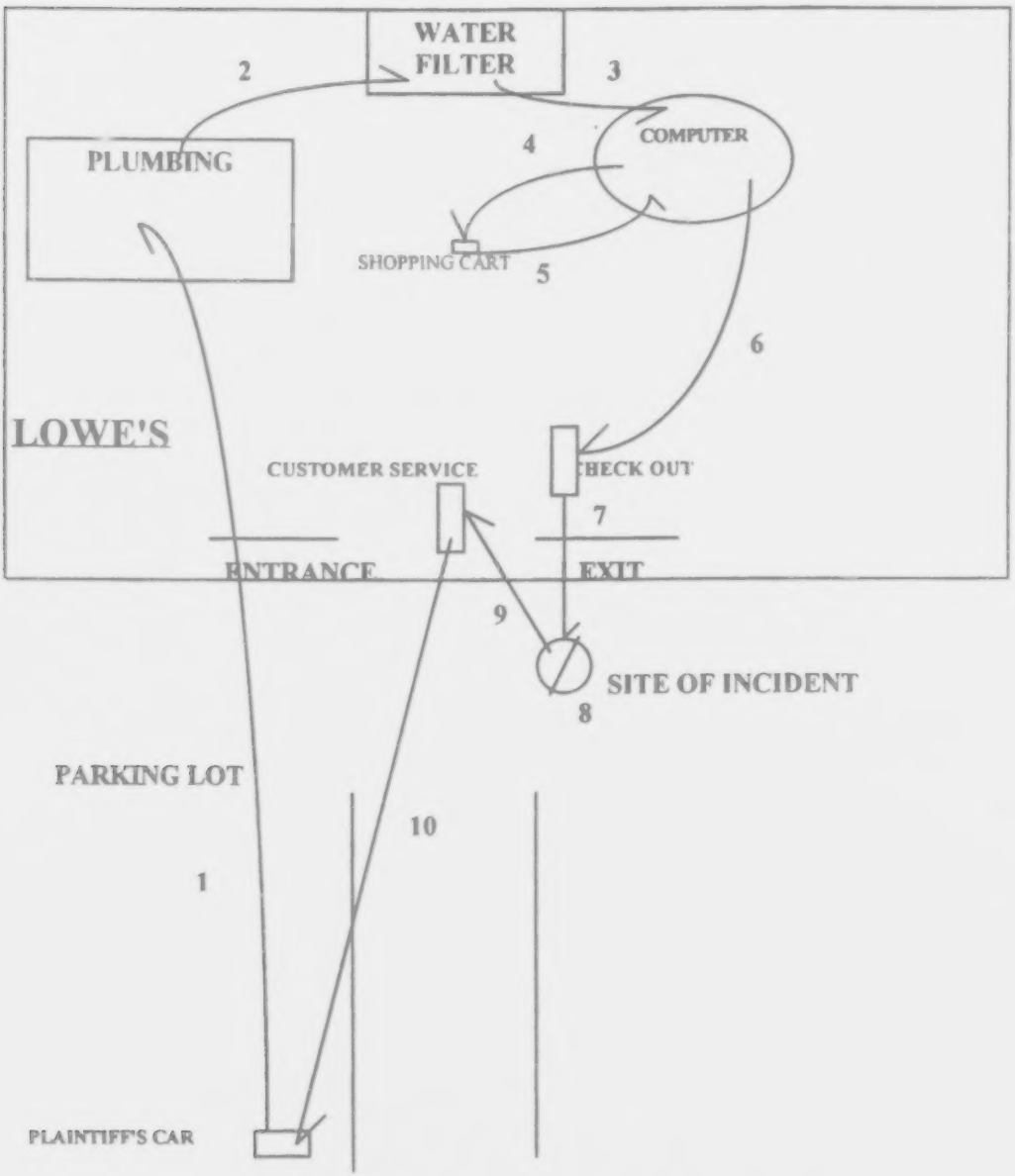
ORDER OF EVENTS **CASE NO.5:97-CV-1040-B02**



I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. /s/Larry Barnes,Sr

EXHIBIT #1 DATE 3/28/98 SIGN _____

APPENDIX A

CASE NO . 5:97-CV-1040-B02

L O W E ' S

CLERK # 3684 12-30-95

73073	CURTIS MULTI-MEDIA	10.04
	4 @ 2.51	
72457	S.CORONA TYPWRITER	4.31
72457	S.CORONA TYPWRITER	4.31
72457	S.CORONA TYPWRITER	4.31
25694	TELEDYNE CARTRIDGE	5.96
91095	TI 8DIG HANDHELD C	2.65
79366	S.CORONA LIFTOFF C	.73
79366	S.CORONA LIFTOFF C	.73
79366	S.CORONA LIFTOFF C	.73
79366	S.CORONA LIFTOFF C	.73
79366	S.CORONA LIFTOFF C	.73
79366	S.CORONA LIFTOFF C	.73
	SUBTOTAL	35.96
	TAX 38064	2.16
	TOTAL	38.12
	CASH TENDER	40.00
	CHANGE	1.88

THANK YOU FOR SHOPPING LOWE'S

0444 10 12/30/95 16:50 NO. 829

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. /s/Larry Barnes,Sr

EXHIBIT #1 DATE 3/28/98 SIGN _____

APPENDIX B

CASE NO . 5:97-CV-1040-B02

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. /s/Larry Barnes,Sr
EXHIBIT #1 DATE 3/29/95 SIGN _____

APPENDIX C

Case No. 5:97-CV-1040-B02

DECLARATION OF KENNETH ISOM BARNES

I, Kenneth Isom Barnes, declare under penalty of perjury:

1. I am the son of Larry Barnes, Sr., who is the plaintiff in the above cited case of Barnes v. Lowe's (case no. 5:97-CV-1040-B02) pending in the United States District Court for The Eastern District of North Carolina (Western Division).

2. On December 30, 1995 while driving, my father decided to stop at Lowe's on Capital Boulevard in Raleigh, North Carolina.

3. I did not want my father to stop because I was tired and getting sleepy.

4. I just wanted to go home.

5. My father said that he would be "quick" .

6. He said he needed to buy only one thing and would be back in five minutes.

7. Since I was tired, I stayed in the car and reclined the seat.

8. My father took longer than expected.

9. I was getting irritated.

10. For awhile, I considered entering the store to look for him.

11. But, I decided to wait a little longer.

12. Finally, my father came back to the car.

13. I asked, "what took such a long time"?

14. However, before I finished my statement, I could tell as he got into the car that he was very upset!

15. He was very happy when he left the car to go into Lowe's, but he was very upset when he came back.

16. I asked him, " what's wrong dad?"

17. At first, he did not say anything,sort of mumbling to himself, frowning.

18. Then he told me what had happened.

19. He said the he had been stopped in the parking lot, had his bags searched,and accused of shoplifting because he is Black.

20. He sat in the car for a while watching the front exit of Lowe's, he was becoming even more angry.

21. I said " let's go home," I became very frighten and unsettled

22. He said, "not yet , I am going to see if they stop any White people in the parking lot and accuse them of shop lifting!"

23. We sat in the parking lot watching people existing the store.

24. He said he was watching to see if they stopped any White people in the parking lot to check their receipts.

25.I wanted my father and me to leave the area immediately.

26. He said, "wait, I need to check on something", then he got out of the car and headed towards the store.

27. At this time reality had become a nightmare.

28. He returned to the car more upset then when he left.

29. He said, "I am going to write the president of Lowe's and make a complaint".

30. We left Lowe's parking lot and returned home.

31. At home he related the incident to my mother.

32. I can say honestly under penalty of perjury, that this

incidental truly ruined my father's life, he has talked about it almost every for the last two years

33. After Lowe's wrote him back and said that he got the right kind treatment , he seems to be getting angrier each day.

34. He appears to be obsessed with this injustice.

35. This incident has affected every member of my family.

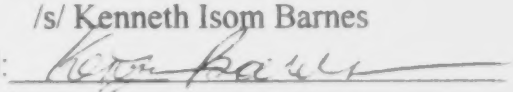
36. As a junior in high school at that time, this incidence caused me to experience emotions that I hope that I will never experience again.

37. I am now a hardworking freshman at Duke University, I gave my life to Christ at 5 years of age, and I have never been in trouble. I pray that I can go far in life. I pray that the injustice which that my Father is experiencing will come to an end for Black people.

I declare under penalty of perjury that the foregoing is true and correct.

Date: March 24, 1998

/s/ Kenneth Isom Barnes

Signed: 

Kenneth Isom Barnes